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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DAVID B. LOCKTON, Plaintiff and Appellant, v. MARSHALL SMALL et al., Defendants and Appellants.	H025958 (Santa Clara County Super. Ct. No. CV810963)

These appellate proceedings arise from an order partially granting the defendants' special motion to strike the plaintiff's defamation complaint as a strategic lawsuit against public participation. The plaintiff appeals from the order to the extent that it grants the motion to strike the first two causes of action of his complaint. The defendants cross-appeal from the order to the extent that it denies their motion to strike the remaining two causes of action. We agree with the defendants' contentions. We therefore reverse and remand, with instructions to grant the special motion to strike as to all four causes of action of the plaintiff's complaint.

BACKGROUND

Plaintiff David B. Lockton founded a company called Interactive Network, Inc. ("IN" or "the company"). He was the company's president and chief executive officer until June 1998, when its board of directors removed him from those positions. He continued on the company's board until March 1999.

In August 1999, plaintiff filed an action in the superior court in Los Angeles County against various entities and individuals, including five of the company's directors. The complaint in that action alleged that the defendants named there engaged in or assisted an "unlawful drive to oust plaintiff from his own company." It asserted five causes of action, including defamation.

More than three years later, in September 2002, plaintiff filed this action.

The defendants named here are two attorneys, Marshall Small and Adam Lewis, and their law firm, Morrison & Foerster, a California Limited Liability Partnership. Defendants represented IN and its board of directors in connection with a shareholder dispute (a proxy contest involving plaintiff) and in the company's bankruptcy proceeding.

Plaintiff's complaint asserts four causes of action: libel per se, libel per quod, slander, and Labor Code violations. In the first three causes of action, plaintiff accuses defendants of defaming him in 1998 and 1999 through oral statements, press releases and shareholder reports, documents filed in bankruptcy court, and correspondence with the Securities and Exchange Commission ("SEC"). The fourth cause of action asserts that defendants' defamatory statements were intended to prevent plaintiff's future employment, in violation of Labor Code sections 1050 et seq. Generally speaking, the offending statements in the foregoing communications relate to defendants' stated belief that plaintiff was guilty of mismanagement and of breaches of his fiduciary duty to the company.

In January 2003, defendants responded to plaintiff's complaint by filing two separate motions to strike it – one brought under Civil Code section 1714.10 and the other under Code of Civil Procedure section 425.16.[1] Plaintiff opposed both motions.

[1] Further unspecified statutory references are to the Code of Civil Procedure.

In March 2003, after conducting a hearing on the two motions, the trial court partially granted defendants' special motion to strike under section 425.16.[2] As a result of that ruling, plaintiff's first and second causes of action were dismissed while his third and fourth causes of action survived.

Both parties appealed the trial court's decision.

CONTENTIONS

In his appeal, plaintiff contends that the trial court erred in striking the first two causes of action of his complaint. In their cross-appeal, defendants assert that the court should have dismissed the entire complaint as a strategic lawsuit against public participation.

DISCUSSION

We begin our assessment of the parties' contentions by setting forth the general principles that inform our analysis. We then apply those principles to the case at hand, addressing first plaintiff's appeal and then defendants' cross-appeal.

I. General Principles

Strategic lawsuits against public participation are commonly referred to by the acronym "SLAPP." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57 (*Equilon*.) The paradigm action of this type is "a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2 (*Wilcox*), disapproved on another ground in *Equilon, supra,* 29 Cal.4th at p. 68, fn. 5. See also *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89

[2] The court denied defendants' motion to strike under Civil Code section 1714.10. That ruling is not at issue here.

(*Navellier*). See generally 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 962, pp. 422-424; *id*. (2004 supp.) § 962, pp. 47-53.)

In 1992, the Legislature responded to the "disturbing increase" in such suits by enacting section 425.16. (§ 425.16, subd. (a); see *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1063.) The statute incorporates the Legislature's express declaration "that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (§ 425.16, subd. (a).) In 1997, the statute was amended to clarify the Legislature's intent that "this section shall be construed broadly." (*Ibid*. See *Equilon, supra,* 29 Cal.4th at p. 60; *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 863, fn. 18.)

A. Motion to Strike

The statute furnishes a mechanism for quickly identifying and eliminating suits that chill public participation: a special motion to strike, commonly called an anti-SLAPP motion. The statute provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

The statutory definition of an "act in furtherance of [the constitutional] right of petition or free speech" expressly includes "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral

statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

A special motion to strike triggers a two-step process in the trial court. (*Equilon, supra*, 29 Cal.4th at p. 67. See also, e.g., *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 (*Cotati*); *Navellier, supra*, 29 Cal.4th at p. 88.) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. [Citation.]" (*Cotati, supra*, 29 Cal.4th at p. 76, citing § 425.16, subd. (b)(1). See also, e.g., *Equilon, supra*, 29 Cal.4th at p. 67; *Navellier, supra*, 29 Cal.4th at p. 88.) "If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citation.]" (*Cotati*, *supra*, 29 Cal.4th at p. 76. See, § 425.16, subd. (b)(1). See also, e.g., *Equilon*, *supra*, 29 Cal.4th at p. 67; *Navellier*, *supra*, 29 Cal.4th at p. 88.)

In each part of the two-step process, the party with the burden need only make a threshold, prima facie showing. (*Cotati, supra*, 29 Cal.4th at p. 76; *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 112.) "A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851 [summary judgment].) "The words 'prima facie' mean literally, 'at first view,' and a prima facie case is one which is received or continues until the contrary is shown and can be overthrown only by rebutting evidence adduced on the other side. [Citation.]" (*Maganini v. Quinn* (1950) 99 Cal.App.2d 1, 8 [effect of statutory presumption as prima facie evidence].)

In assessing the first prong of the test—whether the defendant has demonstrated that the action is one arising from protected activity—the trial court must consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the

liability or defense is based." (§ 425.16, subd. (b)(2). See, *Cotati, supra*, 29 Cal.4th at p. 79; *Navellier, supra*, 29 Cal.4th at p. 89.) The trial court need not consider inferences arising from the pleadings, however. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1001-1002 (*ComputerXpress*).) In analyzing the second prong of the test—whether the plaintiff has demonstrated a probability of prevailing on the merits—the trial court measures the plaintiff's showing against a standard similar to that used in deciding a motion for nonsuit, directed verdict, or summary judgment. (*ComputerXpress*, *supra*, 93 Cal.App.4th at p. 1010; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653 (*Church of Scientology*), disapproved on another ground in *Equilon, supra*, 29 Cal.4th at p. 68, fn. 5.) The court determines only whether the plaintiff has made a prima facie showing of facts that would support a judgment if proved at trial; it does not weigh plaintiff's evidence. (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1010; *Church of Scientology, supra*, 42 Cal.App.4th at pp. 653-654.) But the plaintiff may not rely solely on allegations in the complaint, even if verified; rather, the plaintiff's showing must be made by competent, admissible evidence. (*Id.* at p. 1010; *Church of Scientology, supra*, 42 Cal.App.4th at pp. 654-655.)

The statutory motion to strike may be granted as to one or more causes of action, rather than the entire complaint. (§ 425.16, subd. (b)(1).) This is particularly appropriate in cases where the plaintiff's "claims are not factually or legally intertwined." (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1004.)

B. Types of Claims

Strategic lawsuits against public participation encompass a variety of different factual contexts, a variety of different legal actions, and a variety of different defendants. (See, e.g., *Paul v. Friedman, supra*, 95 Cal.App.4th at p. 864; *Church of Scientology*, *supra*, 42 Cal.App.4th at p. 652; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶¶ 7:222 to 7:238, pp. 7-75 to 7-88.)

The range of legal actions that might qualify as strategic lawsuits against public participation is broad; it includes "all kinds of claims . . . ." (*Church of Scientology, supra*, 42 Cal.App.4th at p. 652.) As relevant here, defamation is among the "favored causes of action in SLAPP suits . . . ." (*Wilcox, supra*, 27 Cal.App.4th at p. 816. See, e.g, *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 915 (*Rivero*) [action against union for libel and slander]; *ComputerXpress, supra*, 93 Cal.App.4th at p. 1005 [action against former merger target for trade libel]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400 [action against opponent's attorney for defamation]; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 471 [action against homeowners' association members, directors, and club for defamation]; *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1448 [action against political rival for defamation].)

C. Persons Entitled to Protection

Attorneys are among those entitled to protection from strategic lawsuits against public participation. (See, e.g., *Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1086 [special motion to strike brought by attorney who was sued for malicious prosecution in response to tort and contract action she filed on her clients' behalf]; *Paul v. Friedman, supra*, 95 Cal.App.4th at p. 857 [special motion to strike brought by attorney who was sued for breaching a confidentiality agreement and for various torts following a fraud investigation and arbitration on behalf of his clients]; *Dowling v. Zimmerman, supra,* 85 Cal.App.4th at pp. 1408-1409 [special motion to strike brought by attorney who was sued for defamation, misrepresentation, and infliction of emotional distress in response to her representation of clients in an unlawful detainer action]. Cf., *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 152-154, 153 [attorney and law firm who exercised their own free speech rights in connection with an insurance fraud action—"albeit also on behalf of their clients"—had standing to bring special motion to strike on

speech grounds; but court left open question of whether motion could be based on attorneys' petition rights]. See generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra,* ¶¶ 7:235 to 7:238, pp. 7-84 to 7-88.)

D. Appellate Review

An order granting or denying a special motion to strike is appealable. (§ 425.16, subd. (j); § 904.1, subd. (a)(13).)

1. Standard of Review

On appeal, we review the entire record de novo to determine, first, whether the defendant has made the requisite initial showing that the plaintiff's action arose from protected activity, and, if so, whether the plaintiff has demonstrated a reasonable probability of success. (*San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association et al.* (2004) 125 Cal.App.4th 343, 352; *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees, supra*, 69 Cal.App.4th at p. 1063; *ComputerXpress, supra*, 93 Cal.App.4th at p. 999.)

2. Scope of review

Our review covers the appellate record. "As a general rule, documents not before the trial court cannot be included as a part of the record on appeal. [Citation.]" (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.) By statute and court rule, however, reviewing courts have discretion to consider evidence that was not before the trial court. (§ 909; Cal. Rules of Court, rule 22.) But only "exceptional circumstances" justify the appellate court's review of matters outside the trial court record. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Furthermore, the statute and rule "do not warrant an appellate court's general reversal of a judgment on the basis of newly discovered evidence presented in the appellate court. [Citation.]" (*People v. Pena* (1972) 25 Cal.App.3d 414, 422, disapproved on another

point in *People v. Duran* (1976) 16 Cal.3d 282, 292. See also, e.g., *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.)

In this case, we previously granted defendants' unopposed request for judicial notice of a complaint filed by plaintiff in May 2004 against some of his former attorneys. But after more thoroughly reviewing the record that was before the trial court and analyzing the issues that have been presented in this court, we have concluded that we should not consider the previously noticed material. "Although a reviewing court may take judicial notice of matters not before the trial court," as we did here, "the reviewing court need not give effect to such evidence." (*Doers v. Golden Gate Bridge etc. Dist., supra,* 23 Cal.3d at p. 184, fn. 1. See also *Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1173, fn. 11.)

As we advised the parties prior to oral argument, it would be improper to give effect to evidence of the later-filed complaint, which was not before the trial court when it decided the motion to strike. (See *Vons Companies, Inc. v. Seabest Foods, Inc., supra,* 14 Cal.4th at p. 444, fn. 3 [refusing to consider new evidence proffered to rebut factual claims raised in motion to quash].) Because the record on appeal does not include the later filed complaint, defendants may not rely on it. (See *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003 [parties "may not rely upon matters which are not part of the record on appeal"].)

II. Analysis: Plaintiff's Appeal

With the foregoing principles in mind, we now consider the contentions raised by plaintiff's appeal, which challenges the trial court's dismissal of the first and second causes of action of his complaint.

A. Does section 425.16 apply to the first two causes of action for libel?

Plaintiff's first two causes of action assert libel per se and libel per quod. "A statement is libelous 'per se' when on its face the words of the statement are of such a character as to be actionable without a showing of special damage. A libel 'per quod,' on the other hand, requires that the injurious character or effect be established by allegation and proof." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154. See Civ. Code, §§ 45, 45a.) Plaintiff's two libel claims are premised on various written statements made by defendants, which fall into three broad categories: (a) those made to the SEC, (b) those made in connection with the company's bankruptcy, and (c) those made in press releases and shareholder reports.

Plaintiff contends that the statute does not apply to defendants' statements because (1) they were not made in connection with an official proceeding, (2) they were not made in a public forum and they did not concern a question of public interest, and (3) they constitute commercial speech.

We consider each point in turn, bearing in mind that it is defendants' burden to make a prima facie showing that plaintiff's suit arises from protected activity. (*Equilon, supra*, 29 Cal.4th at p. 66.) "As courts applying the anti-SLAPP statute have recognized, the 'arising from' requirement is not always easily met. [Citations.] The only means specified in section 425.16 by which a moving defendant can satisfy the requirement is to demonstrate that the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) . . . ." (*Ibid.*) As noted above, those four categories are: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing

made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

1. Were the statements made in connection with an official proceeding?

Of the statute's four categories, two concern activity in connection with official proceedings. The first category protects statements "made before" an official proceeding. (§ 425.16, subd. (e)(1).) The second protects statements "made in connection with an issue under consideration or review" in an official proceeding or by a lawfully constituted body. (§ 425.16, subd. (e)(2).) Defendants claim protection under these provisions for their communications with the SEC and for their client's declaration filed in connection with the company's bankruptcy.

a. The statements made to the SEC are entitled to statutory protection.

According to plaintiff's opening brief on appeal, defendants' defamatory communications to the SEC include the February 1999 preliminary proxy statement (Exhibit G to the complaint) as well as five letters to the SEC written by defendant Small (Exhibits A through E).

Plaintiff contends that these statements were not connected to an official proceeding, arguing that the SEC "had not, and *never did*, commence any proceeding regarding the shareholder dispute or any other matter." In support of that argument, plaintiff quotes the SEC's definition of "proceeding." He also cites *Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 866 (*Ascherman*). According to plaintiff, the three factors described in the *Ascherman* case operate to limit what constitutes an "official proceeding."

Defendants disagree, asserting: "The SEC is an executive agency and statements made to the SEC are covered by the Anti-SLAPP statute." In support, they cite *ComputerXpress, supra*, 93 Cal.App.4th at p. 1009.

As we explain, defendants have the better argument.

First, we are not persuaded by plaintiff's citation to *Ascherman*, which predates the enactment of section 425.16 by two decades. The analysis in *Ascherman* turns on the narrow question of whether an "administrative body or agency possesses a quasi-judicial power" for purposes of the litigation privilege. (*Ascherman, supra,* 23 Cal.App.3d at p. 866; see Civ. Code, § 47, subd. (b) [litigation privilege].) It was in the context of addressing that issue that the *Ascherman* court set forth the three "primary factors which determine the nature of the proceedings" as quasi-judicial. (*Ascherman, supra,* 23 Cal.App.3d at p. 866.) The court's discussion clearly is not an attempt to restrictively define the term "official proceedings." *Ascherman* simply "held that a hearing by the directors of a public hospital district on a doctor's application for staff privileges *was* an official proceeding authorized by law." (*Hackethal v. Weissbein* (1979) 24 Cal.3d 55, 59, italics added.) Notably, the *Ascherman* court accorded protection to statements made in an interview that preceded the actual hearing, holding that the litigation privilege "extends to preliminary conversations and interviews . . . if they are some way related to or connected with a pending or contemplated action. [Citations.]" (*Ascherman, supra,* 23 Cal.App.3d at p. 865.)

Furthermore, our state's high court has since endorsed a broad definition of official proceedings. "In the analogous context of the privilege under Civil Code section 47 for a statement in an official proceeding, the California Supreme Court has observed that the term 'official proceeding' 'has been interpreted broadly to protect communications to or from governmental officials which may precede the initiation of formal proceedings.' [Citation.]" (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1009, citing and quoting *Slaughter v. Friedman, supra,* 32 Cal.3d at p. 156, italics omitted.)

In the *ComputerXpress* case, the plaintiff asserted its trade libel claim after the defendants "sent to the SEC a letter of complaint against the corporate predecessor to ComputerXpress and its officers and directors." (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1008.) Given those facts, the court there had "little difficulty concluding that the filing of the [SEC] complaint [letter] qualified at least as a statement before an official proceeding." (*Id.* at p. 1009.) The court rebuffed the plaintiff's contention that there was no issue then under SEC consideration, saying: "the purpose of the complaint was to *solicit* an SEC investigation." (*Ibid.*) As the court observed, the commencement of formal proceedings by an official agency is not a prerequisite to statutory protection for communications to the agency intended to prompt its action. (*Ibid.*)

Based on the foregoing authority, it is clear that the firm's letters to the SEC and the proxy statement all fall within the broadly defined realm of official proceedings, as "communications to or from governmental officials which may precede the initiation of formal proceedings. [Citations.]" (*Slaughter v. Friedman, supra,* 32 Cal.3d at p. 156, italics omitted.) Those communications thus qualify for statutory protection under section 425.16, subdivision (e)(1), as statements "made before" an official proceeding.

Moreover, defendants' SEC communications also qualify for statutory protection under the second category, as statements "made in connection with an issue under consideration or review" in an official proceeding or by a lawfully constituted body. (§ 425.16, subd. (e) (2).) This provision has been applied to statements made outside of the confines of formal proceedings. (See, e.g., *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 564 [suit alleged that "defendant made false statements before regulatory bodies, the medical profession, and to the public in connection with one of its pharmaceutical products"]; *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 740 [suit based on defendant's statements while "participating in the CEQA public comment and review process"]; *Dove Audio, Inc. v. Rosenfeld, Meyer &*

Susman (1996) 47 Cal.App.4th 777, 784 [suit based on attorney's letter, which proposed a "complaint to the Attorney General seeking an investigation"]. Because the institution of a formal proceeding is not required for application of this prong of the statute, the SEC definition of "proceeding" does not govern the analysis here.

In light of the broad construction given both to the term "official proceeding" and to the concept of official consideration, we conclude that all of defendants' communications to the SEC qualify for protection under the statute.

b. The bankruptcy declaration qualifies for statutory protection.

In his pleading, plaintiff also complains of a declaration submitted in the company's bankruptcy action, which was signed by IN director Bruce Bauer.[3] Plaintiff alleges that defendant Lewis "personally assisted" Bauer in preparing the defamatory declaration.

Plaintiff makes no attempt to argue that the bankruptcy action is not an official proceeding. Rather, he asserts that the statements made in the bankruptcy declaration do not fall within the protection of section 425.16, because they are "irrelevant" to the issues that they purport to address. In support of this assertion, plaintiff cites cases rejecting the notion "that *any* conduct in connection with an official proceeding is protected by the statute." (*Paul v. Friedman, supra*, 95 Cal.App.4th at p. 866. See also *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280,

[3] That declaration was signed in early December 1998. It was filed in support of the company's application for a protective order against plaintiff's attempts at discovery in the bankruptcy action. Two other Bauer declarations are also in the trial court record, as part of plaintiff's request for judicial notice in opposition to the motion to strike. One is a reply declaration in the bankruptcy court on the discovery issue. The other declaration relates to a superior court matter in San Mateo County involving plaintiff's call for a shareholder meeting. In these appellate proceedings, we consider only the declaration that plaintiff describes in his complaint, which was the first one filed in the bankruptcy action.

284-285.) "The statute does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding. The statements or writings in question must occur in connection with 'an issue under consideration or review' in the proceeding." (*Paul v. Friedman, supra*, 95 Cal.App.4th at p. 866.)

Defendants first distinguish the two cases on which plaintiff relies. As they point out, neither case involved documents filed in a judicial action. In *Paul v. Friedman,* the statements at issue resulted from "a harassing investigation" featuring "disclosures to clients and others about [the plaintiff's] personal life" that "had nothing to do with the claims under consideration in the arbitration." (*Paul v. Friedman, supra*, 95 Cal.App.4th at p. 866.) In *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants*, *Inc.*, the statements at issue were false "damage reports" sent to the insurance company as demands for payment at a time when no judicial action was pending. (*People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc., supra,* 86 Cal.App.4th at p. 285.)

We find those distinctions significant. The declaration complained of here was filed *with* the bankruptcy court *in* the bankruptcy action. It thus qualifies for protection under the first statutory category as a statement "made before" an official proceeding. (§ 425.16, subd. (e)(1).) By contrast, neither of plaintiff's two cited cases involved documents filed with a court. Neither court found the statute applicable, and both expressly rejected the defense bid for protection under the first statutory provision. (See *Paul v. Friedman, supra*, 95 Cal.App.4th at p. 865 [plaintiff "plainly did not seek redress for any statements of [defendant's] 'made in' the arbitration or 'before' the arbitrators"]; cf., *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc., supra,* 86 Cal.App.4th at pp. 284-285 [although "some of the reports eventually were used in official proceedings or litigation, they were not created 'before,' or 'in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding' "].) Thus neither decision stands for the proposition that the first statutory category requires relevance.

In any event, as defendants correctly assert, the Bauer declaration *was* relevant to the discovery dispute then pending before the bankruptcy court. In that proceeding, plaintiff had requested certain company documents. Bauer's declaration was filed in support of the company's efforts to resist the requested discovery. Among other things, Bauer declared that the company had faced difficulty in reconstructing its books and records, in "material part because of Mr. Lockton's neglect of these matters" during his stewardship of the company. Thus, to the extent that the provision requires relevance, that requirement is satisfied here.

In sum, Bauer's declaration in the bankruptcy action qualifies for statutory protection under section 425.16, subdivision (e)(1), as a statement made before a judicial proceeding.

Summary

We have considered defendants' statements in the context of the statute's first two provisions, which apply to activity in connection with official proceedings. We conclude that defendants' communications with the SEC are protected as statements "made before" or "in connection with" an official proceeding. (§ 425.16, subd. (e)(1) & (2).) We further conclude that the Bauer declaration, filed in the company's bankruptcy action, is protected as a statement "made before" an official proceeding. (§ 425.16, subd. (e)(1).)

2. Were the press releases and shareholder reports made in a public forum in connection with a public issue?

This next question implicates the subdivision's third provision, which applies to statements made "in a place open to the public or a public forum in connection with an issue of public interest." (§ 425.16, subd. (e)(3).) For statements to qualify under this provision, the moving defendant must show both elements: a public forum and a public issue. (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at p. 478.)

According to plaintiff, the subdivision's third provision offers no protection for defendants' communications.[4] He argues that the statements at issue "were *not made* in a place open to the public nor were they made in a public forum in connection with an issue of public interest." Defendants disagree. As we now explain, we reject plaintiff's argument.

a. The statements were made in a public forum.

"A 'public forum' is traditionally defined as a place that is open to the public where information is freely exchanged. [Citation.]" (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at p. 475.) Under that definition, "a public forum is not limited to a physical setting, but also includes other forms of public communication." (*Id*. at p. 476.)

Disagreements emerge when it comes to applying the definition.

One area of disagreement has arisen with respect to print news media. According to one case: "Means of communication where access is selective, such as most newspapers, newsletters, and other media outlets, are not public forums. [Citation.]" (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1130.) That case held that a "private, selective-access newsletter" is not a public forum. (*Id.* at p. 1131, fn. 4 [newsletter reaching 700 members of token collectors' association].) But another case reached a contrary conclusion, finding that a homeowners' association newsletter is a public forum. (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at pp. 476-478

[4] In his opening brief, plaintiff directs this argument to *all* of defendants' communications to the SEC, which include not only correspondence (five letters and a proxy statement), but also press releases and shareholder reports that were forwarded to the SEC as 8-K, 10-K, and 14-A filings. Defendants deny that they claimed protection for their correspondence to the SEC under this prong. In any event, since we have already concluded that the letters and proxy statement are protected under the first two provisions of section 425.16, subdivision (e), we limit our consideration on this point to the press releases and the shareholder reports.

[newsletter reaching 3,000 residents].) Yet another case raises the theoretical question of whether "a newspaper printing allegedly libelous material is a 'place open to the public or a public forum.' Newspaper editors or publishers customarily retain the final authority on what their newspapers will publish in letters to the editor, editorial pages, and even news articles, resulting at best in a controlled forum not an uninhibited 'public forum.' " (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 863, fn. 5 [dicta].)

A second potential area of controversy in applying the "public forum" definition concerns electronic postings on the Internet. (See e.g., *ComputerXpress, supra*, 93 Cal.App.4th at pp. 1006-1007 and cases cited therein [websites with "chat-rooms" qualify as public forums]. Cf., *Du Charme v. International Brotherhood of Electrical Workers, supra,* 110 Cal.App.4th at p. 114 [no automatic statutory protection under "official proceeding" category for publication on a website].)

Here, the press releases and shareholder reports were distributed both through the mail and electronically, including by posting on the SEC's Internet website, which is known as "EDGAR." Defendants argued below that both constitute public forums; they repeat that contention here. Plaintiff disagrees.

Use of the Mail On the question of whether the mail is a public forum, defendants rely on the case of *Macias v. Hartwell,* which holds: "Speech by mail, i.e., the mailing of a campaign flyer, is a recognized public forum under the SLAPP statute." (*Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 674.) In response, plaintiff first seeks to distinguish that case, saying: "*Macias, supra*, involved a broad distribution of campaign flyers. By contrast, this case involves the sending of communications to the SEC in a forum without direct public access." Plaintiff also analogizes to cases refusing to include print news media within the definition of public forum. (*Weinberg v. Feisel, supra,* 110 Cal.App.4th at p. 1131, fn. 4; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, *supra*, 37 Cal.App.4th at p. 863, fn. 5 [dicta].)

As we see it, the pivotal point here is defendants' use of the mail to publish the challenged statements to IN's shareholders and to others. Plaintiff's own complaint charges defendants with responsibility for issuance of a first "press release to the general public, widely disseminating it to hundreds of news wires … as well as IN shareholders." The complaint posits defendants' intent "that this release would not only be mailed to and read by each and every one of IN's 5,000 shareholders but distributed to members of the financial community at large." The complaint further alleges defendants' publication and dissemination of "a second press release to the general public" with the intent that it would be "mailed to and read by each and every one of IN's 5,000 shareholders and members of the financial community . . . ." The essence of those allegations is repeated in plaintiff's declaration in opposition to the motion to strike. The foregoing allegations and evidence support defendants' contention that its use of the mail in this case represented resort to a public forum. (§ 425.16, subd. (b)(2).)

Use of the Internet In asserting that the Internet postings were made in a public forum, defendants rely on *ComputerXpress,* which states: "Electronic communication media may also constitute public forums." (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1006.) The Internet websites at issue in *ComputerXpress* featured "chat-rooms" that "are open and free to anyone who wants to read the messages; membership is also free and entitles the member to post messages" with "no controls on the postings." (*Id.* at p. 1007, internal quotation marks and citation omitted.) As plaintiff points out, the SEC website is different: although documents filed there may be read by any visitor to the site, only visitors appropriately affiliated with a registered public corporation may file a response.

In this case, we conclude, the Internet postings were made in a public forum. Under the circumstances presented here, we do not limit our consideration to the SEC website alone. Regardless of whether that particular site promotes the open exchange of ideas and information, plaintiff alleges dissemination of the information on other Internet

sites. His complaint asserts: "By electronically filing this information, it was available to anyone with a computer and a telephone who had access to the Internet. By simply visiting one of the hundreds of Internet Web sites available to followers of IN's stock or through "Free Edgar," an electronic system maintained by the SEC, . . . anyone could access this information." Furthermore, plaintiff's declaration states that the offending information found its way to the "Raging Bull" site, where it could be "discussed by the bulletin board participants." Significantly, the "Raging Bull" site is one of the two websites described in *ComputerXpress* as "open and free" with "no controls on the postings." (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1007, internal quotation marks and citation omitted.)

Finally, even if the Internet postings at issue in this case were not made in "a public forum" as that term is traditionally defined, the allegations of the complaint demonstrate that they did occur "in a place open to the public" under the relevant provision. (§ 425.16, subd. (e)(3).)

b. The statements concerned matters of public interest.

"The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. [Citations.]" (*Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at p. 479 [homeowners' association governing 3,000 individuals in 1,633 homes].) Although the cases have not defined "the precise boundaries of a public issue," the concept plainly encompasses "conduct that could directly affect a large number of people beyond the direct participants [citations] or a topic of widespread, public interest [citation]." (*Rivero, supra,* 105 Cal.App.4th at p. 924.) Thus issues of public interest may "include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives

of many individuals." (*Church of Scientology, supra*, 42 Cal.App.4th at p. 650.) In other words, "a matter of public interest should be something of concern to a substantial number of people. [Citation.]" (*Weinberg v. Feisel, supra,* 110 Cal.App.4th at p. 1132 [accusations of criminal behavior made to 700 members is not a public issue]. See also, e.g., *ComputerXpress, supra*, 93 Cal.App.4th at p. 1008 [disparaging remarks about a publicly traded company with millions of outstanding shares is a matter of public interest]; *Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at p. 479 [questions of self-governance affecting 3,000 residents are public issues]; *Macias v. Hartwell, supra,* 55 Cal.App.4th at pp. 673-674 [union election affecting 10,000 members is a public issue].)

Given the definition's broad reach, we have little trouble concluding that the statements at issue here are of public interest. Those statements concern plaintiff's management of IN, a publicly traded company with some 5,000 shareholders, according to plaintiff's complaint. (See *ComputerXpress, supra*, 93 Cal.App.4th at p. 1008.) Plaintiff's own expert testified that these disputed issues were matters of public interest, declaring: "Because the press releases are related to a publicly traded company and were published on the Internet, the press releases related to matters of interest, not only to IN shareholders, but to the general public."

Summary

We have considered the press releases and shareholder reports in the context of the statute's third provision. We conclude that those communications are protected as statements made "in a place open to the public or a public forum in connection with an issue of public interest." (§ 425.16, subd. (e)(3).)

3. Did the statements constitute commercial speech?

As his final avenue of attack in this first step of the process, plaintiff argues that defendants' statements are not entitled to statutory protection because they constitute commercial speech.

"The United States Supreme Court has long held commercial speech receives less protection than noncommercial speech." (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 43. See also, *id.* at pp. 46-47; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 946, 952.) In fact, "commercial speech that is false or misleading is not entitled to First Amendment protection and 'may be prohibited entirely.' [Citations.]" (*Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at p. 953.)

The California Supreme Court recently discussed some of the factors for determining whether particular statements are commercial speech. (*Kasky v. Nike, Inc., supra,* 27 Cal.4th at pp. 956-958.) At its core, the court reiterated, commercial speech proposes a commercial transaction. (*Id.* at p. 956.) In distinguishing commercial speech, it is also appropriate to consider "the identity of both the speaker and the target audience" as well as any references to products or services. (*Id.* at p. 960.) Other "relevant considerations are advertising format and economic motivation. [Citation.]" (*Ibid.*) Applying those factors, our high court held that Nike had engaged in commercial speech: "Because the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading commercial messages." (*Kasky v. Nike, Inc., supra,* 27 Cal.4th at p. 946.)

The distinctions between commercial and noncommercial speech are relevant in the context of section 425.16. (*Nagel v. Twin Laboratories, Inc., supra,* 109 Cal.App.4th

at p. 47. See also, e.g., *Brenton v. Metabolife International, Inc.* (2004) 116 Cal.App.4th 679, 685-686; § 425.17.) In that context, the issue may turn on whether the statements in question constitute an exercise of constitutionally protected speech on a public issue or instead represent an attempt to sell products or services for commercial gain. (*Nagel v. Twin Laboratories, Inc., supra,* 109 Cal.App.4th at pp. 47-48.) At issue in *Nagel* was a list of product ingredients that appeared on labels and on the defendant's website. The court concluded that the ingredient list "is not protected speech under section 425.16." (*Ibid.*) The list was "not participation in the public dialogue on weight management issues; the labeling on its face was designed to further [defendant's] private interest of increasing sales for its products. [Citation.]" (*Id.* at pp. 47-48.)

Here, plaintiff characterizes defendants' statements in the press releases and the SEC filings as commercial speech, urging that "they were intended to affect a commercial transaction" in that they "sought specific shareholder action." He asserts that "the 1934 Securities and Exchange Act expansively interprets what qualifies as a commercial transaction." Plaintiff further argues that defendants' statements were false, that they were illegal under federal securities laws as a result, and that they are not entitled to any constitutional protection. Defendants disagree. They assert that their messages were not aimed at proposing a commercial transaction. They also deny plaintiff's accusations of falsity.

As we analyze defendants' messages, they do not constitute commercial speech. In reaching that conclusion, we apply the relevant factors set forth in *Kasky v. Nike, Inc., supra,* 27 Cal.4th at pp. 956-958. We first consider "the identity of both the speaker and the target audience" as well as any references to products or services. (*Id.* at p. 960.) Here, both the speaker (the company and its representatives) and the audience (the shareholders and the financial community at large) may represent potential actors in a commercial transaction. But we find little in the messages that qualify as references to products or services. We also consider the advertising format of the statement and any

economic motivation. (*Ibid.*) Here, the press release and report formats are more informational than commercial, and any economic motivation by defendants is remote. Finally, we assess the core question of whether the challenged speech proposes a commercial transaction. (*Id.* at p. 956.) We conclude that it does not. To the contrary, as we have already discussed, the messages at issue here are statements on a question of public interest.

Conclusion

We have undertaken a de novo review of the first step in the two-step process of evaluating the special motion to strike – assessing defendants' threshold showing. We did so keeping in mind that a moving defendant "need not *establish* that his action is constitutionally protected; rather, he must make a prima facie showing that plaintiff's claim arises from an act taken to further defendant's rights of petition or free speech in connection with a public issue." (*Du Charme v. International Brotherhood of Electrical Workers*, *supra*, 110 Cal.App.4th at p. 112. See also, *Cotati, supra*, 29 Cal.4th at p. 76 [only a "threshold showing" is required].)

We conclude that defendants in this case made the requisite showing with respect to the first two causes of action of plaintiff's complaint. They carried their initial burden of demonstrating that plaintiff's libel claims arose from constitutionally protected speech and petition rights within the meaning of section 425.16. The burden to defeat the motion thus shifted to plaintiff.

B. Did plaintiff establish a probability of prevailing?

Plaintiff contends that he has established a probability of prevailing. On that point, plaintiff asserts (1) that defendants' statements are false and libelous per se; (2) that defendants' statute of limitations defense is not viable; and (3) that defendants' statements are not privileged.

As before, we consider each assertion in turn, bearing in mind that the burden now shifts to plaintiff, who must make a prima facie showing of the likelihood of success on each cause of action arising from protected activity. (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1010; *Church of Scientology, supra,* 42 Cal.App.4th at pp. 653-654.) To carry that burden, plaintiff must show that he has a legally sufficient claim, which is supported by competent, admissible evidence. (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1010; *Church of Scientology, supra,* 42 Cal.App.4th at pp. 654-655.) In order to demonstrate a legally sufficient claim, plaintiff's evidentiary showing must negate defendants' constitutional defenses. (*Wilcox, supra*, 27 Cal.App.4th at p. 824.) Other "defenses are to be considered if necessary in determining plaintiff's probability of success once the plaintiff has presented evidence of the probability of success." (*Church of Scientology, supra,* 42 Cal.App.4th at p. 658, citing § 425.16, subd. (b).)

1. Were defendants' statements libelous per se?

In analyzing this issue, the natural starting point would be to set forth the elements of plaintiff's two causes of action for libel and then consider plaintiff's evidence as to each required element.

However, as plaintiff correctly asserts, defendants have conceded the point by failing to address it. (See, e.g., *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 9, fn. 1.)

We therefore accept the validity of plaintiff's claim that defendants' written statements constitute libel per se, and we consider the disputed question of defenses.

2. Do defendants have a viable statute of limitations defense?

Defendants assert that plaintiff cannot prevail because his libel claims are time-barred. Plaintiff argues for delayed accrual of those claims, based on the doctrine of

fraudulent concealment. He also contends that the defamatory material was republished, with each repetition starting a new accrual period.

To establish the proper framework for analyzing these contentions, we first describe the relevant legal principles. We then apply them to the record before us.

a. Statute of limitations: general principles

A statute of limitations prescribes the time frame for bringing an action. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395.) "It has as a purpose to protect defendants from the stale claims of dilatory plaintiffs. [Citations.]" (*Ibid.*) "The statute of limitations operates in an action as an affirmative defense. [Citations.]" (*Id.* at p. 396.)

The limitations period commences when the cause of action accrues. (*Norgart v. Upjohn Co., supra*, 21 Cal.4th at p. 387. See generally, Schwing, Cal. Affirmative Defenses (2004) § 25:3, pp. 1131-1136.) In the usual case, a cause of action accrues when it is "complete with all of its elements [citations] . . . ." (*Norgart v. Upjohn Co., supra,* 21 Cal.4th at p. 397.)

"An exception to the general rule for defining the accrual of a cause of action—indeed, the 'most important' one—is the discovery rule. [Citation.]" (*Norgart v. Upjohn Co., supra,* 21 Cal.4th at p. 397.) "It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Ibid*.) But "it is the discovery of facts, not their legal significance, that starts the statute. [Citation.]" (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1113.) Thus, "failure to discover a cause of action . . . does not excuse an untimely filing unless the defendant has fraudulently concealed the cause of action from the plaintiff. [Citations.]" (*Kupka v. Board of Administration* (1981) 122 Cal.App.3d 791, 795.)

The doctrine of fraudulent concealment has been described as a "close cousin of the discovery rule . . . ." (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 931.) This "judicially created" doctrine "limits the typical statute of limitations."

(*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 532, citations omitted.) " 'It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it.' [Citation.] Like the discovery rule, the rule of fraudulent concealment is an equitable principle designed to effect substantial justice between the parties . . . ." (*Bernson v. Browning-Ferris Industries, supra,* 7 Cal.4th at p. 931.)

b. Statute of limitations: libel

The statute of limitations for libel is one year. (Code Civ. Proc., § 340, subd. (c). See *Schneider v. United Airlines, Inc.* (1989) 208 Cal.App.3d 71, 75.)

A "cause of action for libel generally accrues when the defamatory matter is published [citation]; under the discovery rule, however, the date of accrual may be delayed where the defendant's actions hinder plaintiff's discovery of the defamatory matter. [Citations.]" (*Bernson v. Browning-Ferris Industries, supra,* 7 Cal.4th at pp. 931-932.)

c. Republication

In defamation law, "publication occurs when a statement is communicated to any person other than the party defamed. [Citation.]" (*Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 284.) "The general rule is that every repetition of a defamation is a separate publication and gives rise to a new cause of action. [Citation.]" (*Neal v. Gatlin* (1973) 35 Cal.App.3d 871, 877, fn. 4. See *Schneider v. United Airlines, Inc., supra,* 208 Cal.App.3d at p. 74 [cause of action for defamation "accrued when [the recipient] republished the allegedly defamatory statement"]. Cf., Civ. Code §§ 3425.1-3425.5 [Uniform Single Publication Act].) Republication thus occurs "when the original

defamer repeats or recirculates his or her original remarks to a new audience. [Citations.]" (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1243.)

Precedent further establishes "that the originator of the defamatory matter can be liable for each repetition of the defamatory matter by a second party, if he could reasonably have foreseen the repetition. [Citation.]" (*Schneider v. United Airlines, Inc., supra,* 208 Cal.App.3d at p. 75, internal quotation marks omitted. See also *Shively v. Bozanich, supra,* 31 Cal.4th at p. 1243. As our high court has said: "The law relating to the liability of an original defamer for republication offers relevant guidelines. According to the Restatement Second of Torts (1977) section 576, the original defamer is liable if either 'the repetition was authorized or intended by the original defamer' (subd. (b)) or 'the repetition was reasonably to be expected' (subd. (c)). California decisions follow the restatement rule. [Citations.]" (*Mitchell v. Superior Court* (1984) 37 Cal.3d 268, 281.) "The rationale for making the originator of a defamatory statement liable for its foreseeable republication is the strong causal link between the actions of the originator and the damage caused by the republication." (*McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 797.)

Generally speaking, "where the person defamed voluntarily discloses the contents of a libelous communication to others, the originator of the libel is not responsible for the resulting damage. [Citations.]" (*McKinney v. County of Santa Clara, supra,* 110 Cal.App.3d at p. 796.) But there is an exception "where the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement . . . ." (*Ibid*., citations omitted [coerced publication argument accepted]. See also *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284-1285 [coerced publication argument rejected].)

d. Application to this case

Defendants argue that plaintiff's libel claims are time-barred under the one-year statute of limitations, since those claims arose from publication in 1998 and 1999, while this action was not filed until 2002. In response, plaintiff asserts delayed accrual, based on the doctrine of fraudulent concealment. He also argues that a new limitations period started each time the defamatory materials were republished.

We examine the evidence to determine whether plaintiff has carried his burden on these points. (*ComputerXpress, supra*, 93 Cal.App.4th at p. 1010 [plaintiff must demonstrate probability of prevailing by competent, admissible evidence]; *Church of Scientology, supra,* 42 Cal.App.4th at pp. 654-655 [same].) That evidence includes plaintiff's declaration filed in opposition to defendants' motion to strike.

Fraudulent Concealment According to plaintiff's declaration, by mid-September 1999, he had received copies of all of the offending correspondence to the SEC. But it was not until late 2001 – when he deposed defendants Small and Lewis – that plaintiff "first learned of the facts indicating that Defendants were legally responsible for this wrongdoing." Plaintiff reiterates: "Again, I did not possess knowledge of Defendants' responsibility, awareness and authorization of this wrongful conduct, because such was fraudulently concealed from me, in part by the assurances of Small in his [February 24, 1999] letter to [] the SEC . . . ."

In his briefing in this court, plaintiff sets forth a detailed "time line" – with citations to evidence in the record – in an attempt to illustrate defendants' concealment and his own diligence. When we distill that elaborate factual framework, however, it is apparent to us that plaintiff's fraudulent concealment claim rests entirely on the letter of February 24, 1999, which was sent by defendant Small to the SEC, marked "confidential" and "for use of the commission only."

We therefore focus our attention on that letter, which appears as Exhibit A to plaintiff's complaint. As we explain, we find nothing in the letter to support plaintiff's fraudulent concealment claim.

We first consider the letter's confidential designation. In his declaration, plaintiff asserts that that designation represents an attempt "to keep the deception and libelous statements from coming to [his] attention . . . ." We disagree with that characterization. For one thing, the letter itself limits its requested confidentiality. It closes with this paragraph: "We request that the contents of this letter be treated as confidential by the SEC staff until such time as they are asserted in pleadings publicly filed by the Company in its Chapter 11 proceeding." For another thing, plaintiff's declaration demonstrates that he received a copy of the letter on September 13, 1999. Thus, the letter's contents were revealed to him at least by that date. Under the circumstances, the letter's confidential designation alone did not operate as a concealment warranting the delayed accrual of plaintiff's cause of action.

We next consider the letter's contents. The letter is in response to SEC correspondence requesting additional information supporting the law firm's "belief that [plaintiff] has breached his fiduciary duty to [the company] and failed to satisfy certain conditions to receipt of his compensation." First, the letter describes the "three components" of the "employment arrangements" between plaintiff and the company. Next, the letter describes plaintiff's claims against the company, amounting to $3.8 million, according to his bankruptcy claim. Finally, the letter states the company's intent to assert its own claims against plaintiff as set-offs, and it describes the company's claims in five numbered paragraphs. In brief, the company stated its intent to: (1) disallow interest and penalties under the deferred compensation agreement; (2) disallow director's fees; (3) disallow or substantially reduce the amount payable to plaintiff; (4) assert a claim against plaintiff for mismanagement; and (5) assert a claim against plaintiff for breach of his non-competition agreement. Apparently, plaintiff's libel claims are directed

to this last portion of the letter, which sets forth the company's claims against him. In his complaint, plaintiff specifically cites the letter's assertions of mismanagement and breach of fiduciary duty, which appear in the company's third, fourth, and fifth claims. We fail to detect any concealment in the letter. For one thing, the letter itself advises: "The last three claims . . . may require further discovery in any litigation." If anything, that sentence strikes us as an invitation to plaintiff to investigate.

In sum, nothing in the letter supports plaintiff's claim that defendants fraudulently concealed their role from him.

Moreover, other evidence in the record indicates plaintiff's awareness of defendants' part in preparing and disseminating the offending material. Most notable among that evidence is plaintiff's earlier defamation claim, made as part of his 1999 Los Angeles action. Though that action did not name as defendants the individuals sued here, plaintiff nevertheless made factual allegations about them there that are relevant here. For one thing, plaintiff complained of Bauer's bankruptcy declaration – the same one at issue here – saying that it was "proposed, drafted and approved by Small and Lewis" and that it "maliciously, falsely and intentionally defamed" plaintiff. Plaintiff's earlier complaint also cited the company's two December 1998 press releases – the same ones at issue here – saying that the first one was issued "with the direct approval and assistance of Small and Lewis" and that the second one was issued "with the aid and assistance of Small and Lewis." Plaintiff's 1999 complaint also states that the defendants named there "as well as Lewis and Small have published to the Security and Exchange Commission and to the United States Bankruptcy Court . . . false statements portraying IN as a failed corporation due to Lockton's mismanagement and improper acts; false statements that Lockton breached his fiduciary duties to IN in an attempt to . . . damage Lockton's character, reputation and prospective economic opportunities." These allegations fly in the face of plaintiff's declaration that he "did not possess knowledge of Defendants' responsibility, awareness and authorization of this wrongful conduct . . . ."

Finally, we reject plaintiff's assertion that the discrepancy between his declaration and contrary evidence in the record creates a disputed credibility issue requiring trial. It is true that "the trial court does not, pursuant to section 425.16, weigh the evidence or decide disputed questions of fact . . . ." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 822.) By the same token, however, credibility issues require trial only where the undisputed facts leave room for conflicting inferences or reasonable differences of opinion. (Cf., e.g., *Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492 [for appellate court to reverse judgment after trial on the basis of witness credibility, "falsity must be apparent without resorting to inferences or deductions"].) In this case, without the need for drawing inferences, the undisputed facts demonstrate that plaintiff did not rely on any representations by defendants in delaying prosecution of his libel claims against them.

As explained above, a defendant's fraud in concealing a claim from the plaintiff will toll the statute of limitations, " 'but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it.' [Citation.]" (*Bernson v. Browning-Ferris Industries, supra,* 7 Cal.4th at p. 931.) In this case, as the record makes clear, plaintiff discovered – or should have discovered – the facts underlying his defamation claim against these defendants no later than September 1999. His claims arising from the initial publication of the material thus are time-barred.

Republication Plaintiff seeks to avoid the statute of limitations defense on a second ground – that the defamatory material was republished, with each new publication starting a new limitations period. His complaint specifies two categories of republication: (1) the posting of the information on electronic bulletin boards and (2) his own compelled republishing of the information in his search for new employment. Defendants first urge that there has been no republication under governing legal

principles. They further contend that plaintiff has offered no evidence that they authorized or intended any republication or that they reasonably expected any to occur.

(1) We first consider whether there has been any actionable republication as a result of electronic postings. In plaintiff's view, a republication occurs each time someone accesses information available on the Internet. Defendants disagree. They cite the Uniform Single Publication Act, which California has adopted. (Civ. Code, §§ 3425.1-3425.5.) The Act limits a plaintiff to a single "cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine, or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture." (*Id.,* § 3425.3.) Even so, "a *new edition* or new *issue* of a newspaper or book still constitutes a new publication, giving rise to a new and separate cause of action and a new accrual date for the purpose of the statute of limitations. [Citations.]" (*Shively v. Bozanich, supra,* 31 Cal.4th at p. 1245, fn. 7.) As one court held, "all copies of the hardbound first edition of the book gave rise to one cause of action; the republication of that book in paperback form is a new 'issue.' " (*Kanarek v. Bugliosi* (1980) 108 Cal.App.3d 327, 332.)

Comparing Internet access to the rereading of a single issue of a book, defendants argue: "In this case, there are no new editions or versions of the statements. The statements were each published only one time." Defendants also direct our attention to cases decided under the uniform act in other jurisdictions, which all hold that the single publication rule applies to the Internet and that the first posting establishes the publication date. (See, e.g., *Mitan v. Davis* (W.D. Ky 2003) 243 F.Supp.2d 719, 724; *Firth v. State* (N.Y. Ct.Cl. 2000) 706 N.Y.S. 2d 835, 843.)

In the context of Internet postings that are repeatedly accessed in their original form, we find defendants' arguments and authority persuasive. But we need not decide the issue here on that ground alone. As we now explain, even assuming that a

republication occurred as a result of the Internet postings, it would not be actionable in this case.

Republication "gives rise to a separate cause of action for defamation against the original defamer, when the repetition was reasonably foreseeable. [Citations.]" (*Shively v. Bozanich*, *supra*, 31 Cal.4th at p. 1243, italics omitted.) Whether repetition is reasonably foreseeable turns on the circumstances of the case. Thus, for example, defendants who sent information to a credit reporting agency about the plaintiffs' credit "necessarily must have foreseen that said information would be distributed to others (republished) as that is the function of a credit reporting agency." (*Schneider v. United Airlines, Inc., supra,* 208 Cal.App.3d at p. 75.)

In this case, plaintiff first declares that defendants' electronic dissemination of the press releases shows that "it was anticipated and expected that anyone interested in me would discover the statements and make an assessment that I was an incompetent and dishonest business executive." Accepting as true plaintiff's declaration that defendants anticipated that interested Internet users would *discover* the statements, there is no showing of defendants' intent or expectation that those readers would *repeat* the statements.

Plaintiff also cites defendants' rejection of plaintiff's requests for retraction as evidence of their expectation that the statements would be republished. But we fail to see the connection between a refusal to retract and the expectation of republication.

Finally, plaintiff asserts in argument: "The prolific nature of Defendants' smear campaign also demonstrates such intent and expectation." Again, however, we fail to see a connection: we do not find the characterization of defendants' conduct as "prolific" suggestive of their expectation of repetition by others.

In sum, even under the "minimal merit" standard that governs our analysis here, we conclude that plaintiff has failed to carry his burden of making a prima facie showing

on the question of republication by electronic posting. (*Navellier, supra*, 29 Cal.4th at p. 94.)

(2) We next consider plaintiff's claim that his compelled disclosure of the defamatory statements constitutes actionable republication. Plaintiff supports that claim with his declaration, which states that in the course of his search for employment, he "was contacted in January and February 2002 by recruiters who specifically inquired as to the circumstances of" his departure from IN. Plaintiff further declares: "As a result I was compelled to disclose that it was IN's public position that I was terminated for various allegations of mismanagement."

Defendants contend that plaintiff's claim does not fall within the narrow exception for coerced republication described in *McKinney. (McKinney v. County of Santa Clara, supra,* 110 Cal.App.3d at p. 796.) "This exception has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them. Thus, where a derogatory statement is placed in a personnel file, the employee must explain the statement to subsequent employers, who will surely learn of it if they investigate his or her past employment. [Citations.]" (*Live Oak Publishing Co. v. Cohagan, supra,* 234 Cal.App.3d at p. 1285.) Defendants point out that the cases applying the exception have involved plaintiff-employees making preemptive disclosures. As defendants see it, that distinction is significant, given the general rule that a "plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant. [Citations.]" (*Id*. at p. 1284.) But here, of course, the initial publication had already occurred; the question at hand concerns the need for plaintiff's republication.

In this case, plaintiff's evidence adequately demonstrates why he felt compelled to repeat the offending statements and how that republication would be foreseeable. On its face, then, plaintiff's situation appears to present the paradigm circumstance for application of the coerced self-republication exception. But given the analytical

underpinnings of the exception, we must look further and examine the causal link between the original statement and any damages arising from its republication. "The rationale for making the originator of a defamatory statement liable for its foreseeable republication is the strong causal link between the actions of the originator and the damage caused by the republication." (*McKinney v. County of Santa Clara, supra,* 110 Cal.App.3d at p. 797.) Here, there is no evidence supporting that causal link. Plaintiff presents no evidence that it was *his own republication* of the statements that damaged him. To the contrary, he ascribes the damage to his reputation to "Defendants' defamatory statements and their related adverse impact on his ability to obtain executive employment." Without the critical element of causation of damages from the republication, there is no analytic basis for restarting the limitations period.

Summary

The evidence in the record does not support plaintiff's claim for delayed accrual of his libel claims based on fraudulent concealment. Nor does the record support his claim for renewed accrual based on republication. Accordingly, plaintiff's first two causes of action for libel are time-barred. Plaintiff therefore has failed to demonstrate the probability that he will prevail on his libel claims.

3. Were defendants' statements privileged?

In light of our conclusion that plaintiff's claims are barred by the statute of limitations, we need not and do not consider defendants' claim of privilege.

III. Analysis: defendants' cross-appeal

We now turn to defendants' cross-appeal, which addresses the denial of their special motion to strike as to the third and fourth causes of action. Because those two causes of action are legally distinct from each other, we examine each separately. As before, it is defendants' burden to make a threshold showing that each particular cause of

action falls within the protection of section 425.16. If defendants make that showing, the burden shifts to plaintiff, who must establish a prima facie case that the cause of action has merit. (§ 425.16, subd. (b)(1); *Equilon, supra*, 29 Cal.4th at p. 67; *Cotati, supra*, 29 Cal.4th at p. 76; *Navellier, supra*, 29 Cal.4th at p. 88.)

A. Does section 425.16 apply to the third cause of action for slander?

As a framework for addressing this question, we begin by briefly defining slander. We then identify the statements characterized as slanderous here.

Slander is a form of defamation. (Civ. Code, § 44.) The basic distinction between libel and slander is that the former is written while the latter is spoken. (*Id.* §§ 45, 46.)

Here, the third cause of action of plaintiff's complaint asserts slander, based on the factual allegations set forth earlier in the pleading. Among those allegations is this: "Defendant SMALL, acting on behalf of all Defendants, communicated with the SEC orally and in writing. Beginning at least as early as November 24, 1998, SMALL engaged in a series of oral communications in which he made false and slanderous statements to upper level management representatives of the SEC staff which tended to injure LOCKTON . . . by wrongfully creating an inference that his traits of character and his conduct were unethical, fraudulent, and illegal. These communications . . . ultimately resulted in the SEC requesting a written factual substantiation of these allegations by Defendants." In plaintiff's declaration, filed in opposition to the motion to strike, he states: "in preparation for the launch of the attack on my reputation in connection with the proxy fight, the Defendants communicated with the SEC orally and in writing." Plaintiff's declaration continues by describing Small's statements to an SEC representative as "slanderous because they tend to injure me with respect to my profession, trade and business by imputing to me general disqualification in those respects and which created an inference that I had traits of character of being unethical and acting fraudulently and illegally. These included the statements subsequently

repeated in writing" in four letters from Small to the SEC, which are attached to the complaint as Exhibits B through E.

According to defendants, "the oral statements that are the basis of Lockton's slander claim were statements made to the SEC during its review of the proxy materials." Defendants further contend: "Small's oral statements to the SEC were of the same nature and for the same purpose as his letters. Indeed, the letters often state that they follow an oral conversation. Consequently, just as those letters fall within the scope of the Anti-SLAPP statute, so do any oral statements Small made to the SEC. Therefore, Lockton's slander claim is subject to the Anti-SLAPP statute"

Plaintiff rebuffs those contentions, arguing that they are unsupported by the record. He takes defendants to task, complaining that they "do not even describe the 'nature' and 'purpose' of such statements let alone provide evidence in support of any description of such statements."

Plaintiff's position is untenable. First, the ambiguity in describing the offending oral statements must be laid at plaintiff's door, as the author of the complaint. In addition, there is evidence describing the offending oral statements, most particularly plaintiff's declaration. The portion of that declaration quoted above supports defendants' contention that the written and oral statements to the SEC are of a piece.

In short, defendants' oral communications to the SEC qualify for statutory protection for the same reasons and to the same extent as their written communications to that agency. (§ 425.16, subd. (e)(1) & (2).)

Because defendants carried their initial burden of demonstrating that plaintiff's slander claim arose from constitutionally protected speech and petition rights within the meaning of section 425.16, the burden to defeat the motion as to this claim shifted to plaintiff.

B. Did plaintiff establish a probability of prevailing?

For the reasons explained in connection with plaintiff's libel claims, his third cause of action for slander likewise is time-barred. The statute of limitations is one year. (§ 340, subd. (c).) The evidence in the record does not support plaintiff's claim for delayed or renewed accrual of this claim. Accordingly, plaintiff has failed to demonstrate the probability that he will prevail on his slander claim.

That brings us to the final cause of action of the complaint.

C. Does section 425.16 apply to the fourth and final cause of action for Labor Code violations?

As before, to construct the appropriate analytic backdrop, we begin describing the legal underpinnings of plaintiff's fourth cause of action. We then identify and assess the conduct alleged in connection with that claim, to determine whether it falls within one of the four categories protected under section 425.16.

The fourth cause of action of plaintiff's complaint asserts defendants' violation of Labor Code, section 1050. That provision states: "Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor." (Lab. Code, § 1050.)

Factually, that cause of action incorporates the allegations set forth earlier in the pleading. Among those allegations is that plaintiff has been "compelled to disclose that it was IN's public position that he was terminated for various allegations of mismanagement" and that these "libelous publications" are "easily discoverable by any executive recruiter or anyone interested in LOCKTON's background, in a matter of minutes on the Internet." Plaintiff repeats those allegations as facts in his declaration.

According to defendants, plaintiff's Labor Code claim falls within the scope of section 425.16, because it "is based on the same written and oral statements that are the basis of his libel and slander claims." They cite authority holding that "where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct . . . ." (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103.) Defendants also argue that plaintiff did not state a proper claim against them, since he failed to allege that *they* made representations *to* a prospective employer. (See *Kelly v. General Telephone Co., supra,* 136 Cal.App.3d at p. 288 ["Labor Code section 1050 applies only to misrepresentations made to prospective employers"].)

Plaintiff disagrees. He argues that defendants' contentions of deficient pleading are inappropriate on a special motion to strike and that defendants should have raised them by demurrer instead.

To determine whether the statute applies, we focus on defendants' conduct, not on plaintiff's legal theory. "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navellier, supra*, 29 Cal.4th at p. 92.) "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.]" (*Cotati*, *supra*, 29 Cal.4th at p. 78.)

We thus focus on defendants' activity as alleged in the complaint, as *Navellier* instructs. (See *Navellier, supra*, 29 Cal.4th at p. 92.) With that focus, it is plain that their conduct falls within the ambit of section 425.16. Fairly characterized, plaintiff's complaint asserts a single set of operative facts, which it then fits to his four separate causes of action in "a 'chain letter' or cumulative type of pleading." (*Kelly v. General Telephone Co., supra,* 136 Cal.App.3d at p. 285.) Plaintiff's cause of action for Labor

Code violations is based on the same conduct – the same written and oral statements – that form the factual foundation of his causes of action for libel and slander. As we previously determined in analyzing plaintiff's defamation claims, that activity "constitutes protected speech or petitioning." (*Navellier, supra*, 29 Cal.4th at p. 92.) Even assuming that we could perceive allegations of some unprotected conduct in plaintiff's pleading, any such activity would be merely incidental to the statements that form the basis of his claims, including this one. (See, e.g., *Mann v. Quality Old Time Service, Inc., supra,* 120 Cal.App.4th 90; *Brenton v. Metabolife International, Inc., supra,* 116 Cal.App.4th at p. 686.)

Defendants thus made the requisite showing that plaintiff's fourth and final cause of action arose from constitutionally protected activity under section 425.16. Once again, then, the burden to defeat the motion as to this claim shifted to plaintiff.

D. Did plaintiff establish a probability of prevailing?

As with plaintiff's defamation claims, his fourth cause of action is time-barred. According to defendants, the applicable statute of limitations is one year. (See *Walker v. Boeing Corp.* (C.D. Cal. 2002) 218 F.Supp.2d 1177, 1185, fn. 4 ["Labor Code section 1050 claims are similar to claims for defamation or tortious infliction of emotional distress and are governed by the same one-year limitations period"].) Plaintiff does not refute that contention. And as discussed in connection with plaintiff's libel claims, the record does not support plaintiff's argument for tolling or for renewed accrual resulting from republication. For these reasons, we conclude, plaintiff has failed to carry his threshold burden of demonstrating the probability that he will prevail on the claim asserted in his fourth cause of action.

DISPOSITION

We reverse the challenged order, which was entered on March 14, 2003. We remand this matter to the trial court, with instructions to grant the defendants' special motion to strike as to all four causes of action of the plaintiff's complaint, pursuant to section 425.16.

Defendants shall have their costs on appeal.

_____
McAdams, J.

WE CONCUR:

_____
Elia, Acting P.J.

_____
Bamattre-Manoukian, J.